LAW KING PO & ORS A

v.

SACOFA SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, SIBU B
HAMID SULTAN ABU BACKER JC
[CIVIL SUIT NO: 22-26-2005]
25 FEBRUARY 2008

LAND LAW: *Trespass - Encroachment on land - Construction of access road and culvert across subject land - Whether co-owner ousted from using co-owned property - Whether action of trespass maintainable - Whether access road lawful* C

This was a claim by the plaintiffs for trespass and nuisance, and a declaration seeking the demolishment of a telecommunication tower built on a parcel of land adjacent to the plaintiffs' land. The plaintiffs and the D
2nd to 4th defendants were co-proprietors of an undivided share in land ('Lot 134'); the 2nd to 4th defendants were also co-proprietors of an adjacent piece of land ('Lot 73'). With the 2nd to 4th defendants' consent, the 1st defendant had rented part of the land in Lot 73 and built a telecommunication tower with the consent and approval of the E
relevant authorities. The plaintiffs submitted, *inter alia*, that during the construction of the tower on Lot 73, the 1st defendant, their workers and agents entered, cleared and trespassed a portion of Lot 134, and built a reinforced concrete culvert and permanent tar-sealed access road across Lot 134 without any reference to, or consent from, the plaintiffs. F
It must be noted that the right of way through Lot 134 was granted pursuant to s. 34 of the Land Code (Cap 81) (Sarawak) ('Code') by the Superintendent of Lands and Surveys.

Held (dismissing the plaintiffs' claim):

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(1) A co-owner who enjoys an undivided share in the land as a general rule is entitled to use and occupy the whole of the property, subject to a similar right on the part of the other co-owners. An action of trespass cannot be maintainable if the co-owner is not ousted from using the co-owned property. In this case, since the plaintiffs were H
not claiming that they had been ousted by the co-owners, based on the case authorities, their complaint against the 2nd to 4th defendants could not be sustained. The 1st defendant's access road across Lot 134 was lawful pursuant to the order made by the relevant authorities in reliance of s. 34 of the Code. As co-owners, I
the 2nd to 4th defendants had consented to the 1st defendant constructing the road and culvert across the subject land. There was no basis for the assertion that the 1st defendant had trespassed onto the subject land. (paras 8, 9, 10 & 11)

Case(s) referred to:
Dennis v. McDonald [1982] 1 All ER 590 ***(refd)***
Jones v. Jones [1977] 1 WLR 438 ***(refd)***
Nathaniel Uraon v. Mahadeo Uraon & Others [1957] AIR Patna 511 ***(refd)***
Ong Hoo Hong v. Kok Yin Weng [1965] 1 LNS 127 HC ***(refd)***
Tam Kam Cheong v. Stephen Leong Kon Sang & Anor [1979] 1 LNS 108 FC ***(refd)***
Thomas Jacobs v. William Seward [1871-72] LR 5 HL 464 ***(refd)***

Legislation referred to:
Land Code (Cap 81) (Sarawak), s. 34

Other source(s) referred to:
Peter Butt, *Introduction to Land Law*, (1980), p 175

For the plaintiffs - Joe Ang; M/s Ang & Co Advocates
For 1st defendant - Libat Langub; M/s Dr Yaacob & Ismail Advocates
For 2nd to 4th defendants - Wong Ho Leng; M/s Wong Ho Leng & Co Advocates

Reported by Suresh Nathan

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the plaintiffs' claim in trespass and nuisance and a declaration that the telecommunication tower built on a parcel of land adjacent to the plaintiffs' land be demolished.

Brief Fact

[2] The plaintiffs and the 2nd to 4th defendants are co-proprietors of undivided share in land described as Lot 134. Further the 2nd to 4th defendants are co-proprietors of an adjacent land described as Lot 73. With the consent of the 2nd to 4th defendants, the 1st defendant had rented a part of the land in Lot 73 and built a telecommunication tower with consent and approval of the relevant authorities. The plaintiffs complain that (i) during the construction of the tower on Lot 73, the 1st defendant, their workers and agents together with their machineries entered, cleared and trespassed a portion of Lot 134 and built a reinforced concrete culvert and a permanent tar-sealed access road across Lot 134 without any reference to or consent from the plaintiffs. (ii) the tower was built on land to be used for agricultural purposes only and no approval for variation of title in respect of condition has been granted by the Director of Lands and Surveys at the time of construction.

[3] At the commencement of the hearing, parties had agreed that the case can be heard by way of: (i) witness statement for examination in chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination.

The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purpose, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

Plaintiffs' Contention

[4] It is not disputed by the parties that the condition of use of the subject land is for the cultivation of padi. The plaintiffs contend: (a) that the 2nd to 4th defendants failed to obtain the consent of the plaintiffs for the use of the subject land; (b) that the 2nd to 4th defendants failed to take any adequate step to discontinue the trespass of the subject land; (c) that the 2nd to 4th defendants caused or permitted the 1st defendant to construct a permanent tarred access road on the subject land; and (d) that the 2nd to 4th defendants caused the 1st defendants to construct the said tower on Lot 73.

The plaintiffs claim damages, *mesne* profit from the date of trespass, declaration that the tower is illegal, its demolition, a mandatory injunction to remove the road and concrete drain.

2nd To 4th Defendants' Contention

[5] The 2nd to 4th defendants' defence is principally that they are co-owners of the subject land and they therefore have the right and power to allow the 1st defendant to build an access road and culvert on a portion of the subject land. They therefore say that there was no trespass onto the subject land or at all by the defendants.

Issues

[6] The central issues for determining the dispute is (i) whether the plaintiffs have *locus standi* to bring the action against other co-owners when there is no allegation that the plaintiffs have been ousted by the 2nd to 4th defendants. (ii) whether the plaintiffs' rights as co-owners has been violated by the 2nd to 4th defendants.

[7] In this case, two witnesses gave evidence on behalf of the plaintiffs. Two witnesses gave evidence on behalf of the 1st defendant and 3rd defendant gave evidence. After having heard the evidence it is clear the facts of the case are not substantially disputed. The plaintiffs' main witness PW1 in the witness statement had only this to say:

> Sometime in the months of January and February, 2004, I saw workers using heavy machineries constructing a telecommunication tower for the 1st defendant on Lot 73 ("the defendants' land). While doing so, they trespassed on our land. In March, 2004, I asked David Allan Sagah & Teng Advocates to write a letter to the 1st defendant informing them of the matter. David Allan then wrote a letter dated 22-03-2004 to them. I believe the letter had been received by them as the AR Registration card was returned bearing the chop mark of the company. When there was no reply, David Allan wrote another letter dated 30-06-2004 to them. There was again no reply. (Exhibits "P3","P4" & "P5").
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> Now there is a permanent tarred road running from the tower across the plaintiffs' land to the main road. ("Exhibit "P6"). The road is built across the plaintiffs' land without my consent and the consent of the other two plaintiffs. There is also no consent for clearing the trees, undergrowth or vegetation.
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> We wish to build houses on the plaintiffs' land, but with the presence of the tower, no developer would want to build houses there for fear that they could not sell the houses as not many people would want to by houses near to a telecommunication tower for the FEAR that the radiation from the tower may harm one's health. So far, no house is being built on the land near to the tower. (Exhibit "P7").
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> The defendants' land till now still remains an agricultural land and has not been converted into industrial land. I therefore, aver that the tower is constructed on the land illegally, being a breach of the title condition and a breach of the Sarawak Land Code.

During cross examination of PW1, it was established that the right of way though Lot 134 was granted pursuant to s. 34 of Sarawak Land Code by the superintendent of Lands and Surveys and the plaintiffs were represented by their lawyers in the inquiry. Thereafter, the plaintiffs have not appealed against the decision.

Co-owners And The Law

[8] The phrase co-owners or co-proprietors or co-shares etc., who enjoy an undivided share in the land as a general rule are entitled to use and occupy the whole of the property, subject to similar right on the part of the other co-owners. Learned author Peter Butt (1980), p. 175 in his *Introduction to Land Law* says:

> Each co-owner is entitled to use and occupy the whole of the property subject to a similar right on the part of the other co-owners. It follows that a co-owner who exercise this right is not liable to pay an occupation rent, ... subject to 3 exceptions, namely, where the occupier had agreed to pay an occupation rent, where he has wrongfully excluded his co-owner from possession ... or where he is making a claim for expenditure by him for improvements to the property.

In *Tam Kam Cheong v. Stephen Leong Kon Sang & Anor* [1979] 1 LNS 108, the Federal Court held that by holding the undivided share, the co-owners are holding the property "by unity to possession and therefore occupy it promiscuously".

[9] In *Jones v. Jones* [1977] 1 WLR 438 Lord Denning MR observed:

> As between tenants in common, they are equally entitled to occupation and one cannot claim rent from the other. Of course, if there was an ouster, that would be a different matter: or if there was a letting to a stranger for rent that would be different, but there can be no claim for rent by one tenant in common against the other whether at law or in equity.

[10] An action of trespass cannot be maintainable if the co-owner is not ousted from using the co-owned property. Support for the proposition can be garnered from a number of cases. To name a few are as follows:

(a) In *Thomas Jacobs v. William Seward* [1871-72] L.R. 5 H.L. 464 the Court of Appeal stated that:

> Now, as regards the question of trespass, it appears to be perfectly settled ... that unless there be an actual ouster of one tenants in common by another, trespass will not lie by the one against the other as far as the land is concerned.

(see *Dennis v. McDonald* [1982] 1 All ER 590).

(b) In *Nathaniel Uraon v. Mahadeo Uraon and Others* [1957] AIR Patna 511 it was held that it is settled that one co-sharer may use a joint property or any part of it for all legitimate purposes so long as his use of the joint property does not prejudice the rights of the several co-owners and does not amount to their ouster. It is equally well settled that a co-owner can transfer his undivided share in the joint property by way of lease, sale, gift, or otherwise.

(c) In *Ong Hoo Hong v. Kok Yin Weng* [1965] 1 LNS 127 it was held that one co-owner of land can only bring an action for trespass against the other if he has been actually ousted or dispossessed of

A the land. Each owner is entitled to possession of the whole land, so that if one turns the other off the land or part of it, it is a trespass.

[11] I have heard the evidence, read the pleadings and submissions of the parties in detail. I take the view the plaintiffs' action must be B dismissed. My reasons are as follows:

(i) In this case the plaintiffs are not claiming that they have been ousted by the co-owners. In consequence, based on authorities, their complaint against the 2nd to 4th defendants cannot be C sustained.

(ii) It is my judgment that the 1st defendant's access by Lot 134 is lawful pursuant to the order made by the relevant authorities in reliance of s. 34 SLC.

D (iii) As co-owners, the 2nd to 4th defendants had consented to the 1st defendant constructing the road and culvert across the subject land. There is no basis for the assertion that the 1st defendant had trespassed onto the subject land.

E **[12]** For reasons stated above, I dismiss the plaintiffs' claim with costs. The getting up fees shall not exceed RM20,000 for the solicitors for the 1st defendant and a sum of RM30,000 for the solicitors for the 2nd to 4th defendants.

I hereby order so.

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